Supreme Court, U.S.
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No. 92-3

In The

Supreme Court of the United States

October Term, 1992

GREGG FITZGERALD BAILEY,

Petitioner,

v.

BOARD OF COUNTY COMMISSIONERS OF ALACHUA COUNTY, FLORIDA, NATE CALDWELL, COLLEEN HAYES, TOM L. ALLISON, STEPHEN GARRAHAN, JAMES STRAUSS AND GARY BROWN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. MAY GOVERNMENTAL OFFICIALS WITH LEGAL IMPUNITY TO ACTIONS UNDER 42 U.S.C. § 1983 CAUSE A PERSON KNOWN TO THEM TO BE INNOCENT TO BE ARRESTED, JAILED, AND PROSECUTED ON FALSE CHARGES BY PERMITTING A TRAP TO BE SET UP FOR HIS ARREST IN WHICH IT REASONABLY APPEARS TO THE ACTUAL ARRESTING OFFICER THAT THE INNOCENT PERSON IS GUILTY OF A CRIME THAT THE GOVERNMENTAL OFFICIALS KNOW HE DID NOT COMMIT?

II. IS THE LIABILITY OF LOCAL GOVERNMENTAL ENTITIES UNDER 42 U.S.C. § 1983 LIMITED SOLELY TO OCCASIONS IN WHICH THE ULTIMATE POLICYMAKING AUTHORITY SUCH AS A BOARD OF COUNTY COMMISSIONERS HAS ITSELF ADOPTED A SPECIFIC POLICY TO DEPRIVE CONSTITUTIONAL RIGHTS?

III. MAY GOVERNMENTAL OFFICIALS WITH IMPUNITY TO LIABILITY UNDER 42 U.S.C. § 1983 SUMMARILY DEPRIVE A PUBLIC EMPLOYEE OF PROPERTY IN HIS PUBLIC EMPLOYMENT WITHOUT NOTICE, WITHOUT HEARING, AND WITHOUT PAY MERELY BECAUSE THE EXACT FACTUAL SITUATION HAD NOT BEEN CONFRONTED BEFORE?

IV. MAY A CIRCUIT COURT OVERRIDE THE CUSTOMARY DEFERENCE AFFORDED DISTRICT COURT RULINGS ON CHALLENGES FOR CAUSE AND REVERSE A 42 U.S.C. § 1983 VERDICT FOR A CLAIMANT ON THE GROUND OF JUROR BIAS IN THE COMPLETE ABSENCE OF EVIDENCE OF ACTUAL BIAS

QUESTIONS PRESENTED – Continued

AND IN THE PRESENCE OF AN EXTENSIVE VOIR DIRE EXAMINATION OF THE JUROR IN QUESTION WHO HAD VOLUNTARILY DISCLOSED HER VAGUE KNOWLEDGE OF ONE OF THE PARTIES AND REPEATEDLY DENIED BIAS IN MODERATE AND CAUTIOUS REPLIES TO THE DISTRICT COURT'S VOIR DIRE QUESTIONS?

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner Gregg Fitzgerald Bailey provides this Reply to Respondents' Responses to his Petition For Writ of Certiorari and respectfully prays that this Court issue a writ to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on March 31, 1992

ARGUMENT IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

In general, Respondents have failed to address the important legal issues posed by the Petition in favor of making repeated bold assertions that Petitioner has misstated the facts (Brief In Opposition, pp. 10, 11, 17), made "factual and legal misrepresentations" to this Court (Brief In Opposition, p. 13, 16), deliberately misstated standards (Brief In Opposition, p. 14), "misrepresent[ed] the standard" (Brief In Opposition, p. 16), made "false statements and promoted these misrepresentations" (Brief In Opposition, p. 17) and "mischaracterize[d] the evidence" (Brief In Opposition, p. 19). Almost without exception, Respondents have relied solely upon the utterance of these vituperative charges without presenting to this Court argument based upon the record to support them. Although Petitioner believes this not to be the place to deal with all these allegations in detail, Petitioner refers the Court to record refutation of some of them in the argument below. As to the larger point, Petitioner firmly asserts that each factual statement is based upon sufficient evidence in the record to support it and each stated question is squarely presented by these proceedings.[1]

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[1] One example of an erroneous accusation that Petitioner has misrepresented facts will be given. Respondents state that Petitioner's assertation that he has never been paid back wages "is simply untrue" (Brief in Opposition, p. 9, n.2) and is "incorrect." (Brief in Opposition, p. 14, n.2). Respondents also state, "he received back pay and chose not to cash the checks." (Brief in Opposition, p. 14). Respondents do not explain why Petitioner did not cash the checks. The facts are these. On April 11, 1988 Petitioner wrote County demanding relief. (Dep. Ex. 73). On June 15, 1988, County wrote Petitioner stating that he had

QUESTION 1. MAY GOVERNMENTAL OFFICIALS WITH LEGAL IMPUNITY TO ACTIONS UNDER 42 U.S.C. § 1983 CAUSE A PERSON KNOWN TO THEM TO BE INNOCENT TO BE ARRESTED, JAILED AND PROSECUTED ON FALSE CHARGES BY PERMITTING A TRAP TO BE SET UP FOR HIS ARREST IN WHICH IT REASONABLY APPEARS TO THE ACTUAL ARRESTING OFFICER THAT THE INNOCENT PERSON IS GUILTY OF A CRIME THAT THE GOVERNMENTAL OFFICIALS KNOW HE DID NOT COMMIT?

Respondents have attempted to divert this Court's attention from the important constitutional question presented here - i.e. does an official violate § 1983 when he causes an innocent person to be arrested, jailed and prosecuted by failing to supply the arresting and prosecuting officials with exculpatory information known to the Defendant official? – over to the factual question of

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been reinstated as of June 20, and would receive back pay. On June 15, 1988 Petitioner was advised by his psychiatrist not to return to the job at the present time. On June 20, 1988 Petitioner requested to be placed on sick leave, and requested his back pay, which he was not given. A day or two later Petitioner suffered a psychotic episode and was confined to a psychiatric hospital. Petitioner again requested back pay by letter of June 23, 1988. County still did not pay Petitioner the promised back wages. In October 1988 Petitioner commenced this litigation. In September 1989, eleven months after this litigation commenced, County mailed Petitioner a check in the amount of back wages. Upon advice of counsel, Petitioner returned the check asking County to add the endorsement that his acceptance would not release the other claims against it. (Exh. 5). County has never returned the check to Petitioner with that endorsement. Hence, Petitioner's statement that he has never been paid back wages was and remains true.

whether or not the Respondents actually knew the Plaintiff to have been innocent. (Brief In Opposition, p. 10). The record is replete with evidence to support the assertions that Defendants BROWN, GARRAHAN and STRAUSS all possessed information of Petitioner's innocence both before and after his arrest to support jury determinations that they knew Petitioner to be innocent. In fact, the Courts below took away from Petitioner the opportunity to have a jury make those findings by holding as a matter of law that the fact that the arresting officer from whom the information was withheld by Respondents had probable cause to make the arrest provided a defense to *all* Defendants.

At the time the District Court granted directed verdicts dismissing the deprivation of liberty claims against Respondents STRAUSS, BROWN, GARRAHAN and COUNTY, Petitioner's lawyer asked for clarification as to whether the action was dismissed specifically as to Respondent STRAUSS. The relevant portion of the transcript is quoted here:

(Question of Counsel To Court). "Do I understand on the false arrest that Mr. Strauss is still a Defendant?" (R-39-576-118).

To this the Court responded:

The Court: "No, because he wasn't there. He didn't do anything about the arrest. He didn't take steps to do something to head it off, *but you can't hold him civilly liable.* It was Mr. Tileston who decided to arrest him or not arrest him. *Mr. Strauss, if there was any way I could legally keep him in, I would keep him in.*" (R 39-576-118, 119). (e.s.).

Petitioner respectfully submits that the District Court and the Court below were legally wrong to conclude as a matter of law that § 1983 does not provide a remedy against these Respondents for having caused Petitioner to be deprived of his liberty without due process of law. Respondents have provided no argument to undermine the constitutional importance of this legal issue. The cases they cite, i.e. *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969), *Marx v. Gumbinner*, 905 F.2d 1503 (11th Cir. 1990), *Rodriguez v. Jones*, 473 F.2d 599 (5th Cir. 1973), and *Pierson v. Ray*, 386 U.S. 547 (1967), all treat with the issue of probable cause as a defense for *an arresting officer* to a § 1983 action. None deals with the important issue raised in this question. Petitioner earnestly submits that the holding below – that it does not violate § 1983 to knowingly cause an innocent man to be arrested, jailed and prosecuted – deserves this Court's review.

QUESTION II. IS THE LIABILITY OF LOCAL GOVERNMENTAL ENTITIES UNDER 42 U.S.C. § 1983 LIMITED SOLELY TO OCCASIONS IN WHICH THE ULTIMATE POLICYMAKING AUTHORITY SUCH AS A BOARD OF COUNTY COMMISSIONERS HAS ITSELF ADOPTED A SPECIFIC POLICY TO DEPRIVE CONSTITUTIONAL RIGHTS?

Respondents have wholly failed to address the issue raised by this appeal – namely, does the rule of law applied by the courts below in deciding whether Respondent COUNTY had delegated final decision making authority to Respondents CALDWELL and HAYES depart from the constitutional standards laid down by this Court in *Pembauer v. City of Cincinnati*, 475 U.S. 469

(1986) and *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988). As pointed out in Petition 92-3, p. 36, the Court below held that CALDWELL and HAYES were not final decision makers solely because "final policy making authority rested in the BOARD OF COUNTY COMMISSIONERS," 956 F.2d at 1125, without ever examining the detailed evidence in the record establishing that COUNTY *had delegated* final decision making authority to Respondents CALDWELL and HAYES. Contrary to Respondent's assertion that "there is no evidence indicating that the County Commission delegated to anyone its final authority in respect of the personnel policy set by the Commission," the record is replete with evidence to this effect. This evidence is summarized in Petition 92-3, pp. 32-34, and will not be repeated here.

In sum, Respondents have provided no argument to deny the Petition to have this Court review the important legal question of whether the standard applied by the Courts below – i.e., that if a local governmental entity possesses a power it will be conclusively presumed not to have delegated it – comports with the Constitution and § 1983.

QUESTION III. MAY GOVERNMENTAL OFFICIALS WITH IMPUNITY TO LIABILITY UNDER 42 U.S.C. § 1983 SUMMARILY DEPRIVE A PUBLIC EMPLOYEE OF PROPERTY IN HIS PUBLIC EMPLOYMENT WITHOUT NOTICE, WITHOUT HEARING, AND WITHOUT PAY MERELY BECAUSE THE EXACT FACTUAL SITUATION HAD NOT BEEN CONFRONTED BEFORE?

Respondents again have sought to deflect the focus for this Court from the issue framed by Question III in

Petition 92-3. That issue is simply whether or not the Constitution requires predeprivation notice and hearing *or suspension with pay* before a tenured public employee may be pre-emptorily deprived of his property interest in his public employment. The Court below held that the Constitution imposes no such requirement. Petitioner respectfully submits that this ruling does not comport with the Constitution, conflicts with the established precedents of this Court, and needs this Court's review to protect the constitutional rights of persons in the jurisdiction of the Eleventh Circuit and elsewhere.

QUESTION IV: MAY A CIRCUIT COURT OVERRIDE THE CUSTOMARY DEFERENCE AFFORDED DISTRICT COURT RULINGS ON CHALLENGES FOR CAUSE AND REVERSE A 42 U.S.C. § 1983 VERDICT FOR A CLAIMANT ON THE GROUND OF JUROR BIAS IN THE COMPLETE ABSENCE OF EVIDENCE OF ACTUAL BIAS AND IN THE PRESENCE OF AN EXTENSIVE VOIR DIRE EXAMINATION OF THE JUROR IN QUESTION WHO HAD VOLUNTARILY DISCLOSED HER VAGUE KNOWLEDGE OF ONE OF THE PARTIES AND REPEATEDLY DENIED BIAS IN MODERATE AND CAUTIOUS REPLIES TO THE DISTRICT COURT'S VOIR DIRE QUESTIONS?

Respondents again seek to deflect this Court's focus from the important legal issue raised by Question IV in their assertion that, "through overstatement, misstatement and selective omission, Petitioner mischaracterizes the evidence of bias of juror Johns." (Brief In Opposition, p.15). Again, Respondents have made no attempt to support these charges by references to the record. Indeed, Petition 92-3, pp. 16-19, sets out the substance of most of

the voir dire that establishes Petitioner's basis for granting the Petition and demonstrates particularly how the holding of the Court below departs from the standards for reviewing jury bias repeatedly stated by this Court.

The departure of the Court below from those standards is highlighted by Respondents' assertion that, "Petitioner fails to mention that the District Court judge interrupted Johns at a crucial moment in her voir dire testimony." (Brief In Opposition, p. 19). The conclusion that the District Court "interrupted" juror Johns is based upon nothing else but a cold evaluation of the manner in which the court reporter transcribed the testimony. The transcript is printed exactly as follows:

The Court: "[Does anything about your knowledge of] Mr. Bailey that would, in any way, tend to influence your verdict in this case."

Ms. Johns: "I don't feel so at all but - -"

The Court: "Could you tell us how you know him through acquaintanceship at the hospital." [R 20-509-51].

Whether the District Court interrupted Juror Johns or whether Juror Johns merely ended her statement with a tailing "but," simply cannot be told from the cold record. On this point, the appellate courts are required by this Court's precedents to give deference to the decision of the District Court who made the on-the-site evaluation. Despite this, the Court below upended a jury verdict largely on the basis that it read the typed symbols "- -" as signifying an interruption. If appellate courts are permitted to do this, the constitutional right of trial by jury will plainly be impaired. Respondents have offered this Court

no argument to deny the importance of granting review of whether it is error for circuit courts to substitute their judgments based only on the cold record for that of the District Courts.

CONCLUSION

As demonstrated herein, Respondents have sought to deflect this Court's focus from the important legal issues raised by Petition 92-3 by accusing Petitioner, without supporting reference to the record, of repeated misstatements and misrepresentations. Petitioners adheres to each statement of fact made in Petition 92-3 as being supported by sufficient evidence in the record and to his representation that each of the legal questions posed is properly raised in these proceedings. Respondents have not given valid and sufficient reasons to deny the Writ. Accordingly, Petitioner respectfully requests that the Petition be granted.

Respectfully submitted

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August 20, 1992